No. 705

Office-Supreme Court, U.S.
FILED
MAR 12 1964
JOHN F. DAVIS

In The Supreme Court of The United States

October Term, 1963

JOHN WILLIAM WHALEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JOHN WILLIAM WHALEY
In Propria Persona
2420 University Avenue
San Diego, California

IN THE

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of February 17, 1964, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the 9th Circuit in the above-entitled case as prayed for in the petition filed December 26, 1963, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of February 17, 1964, a copy of the transcript re: motion for a new trial, was not presented to the Court. Petitioner now has said transcript, the pertinent copies of which are attached hereto marked Exhibit "A". It can be seen from this transcript that the Court, in fact, coerced Petitioner's attorney to withdraw his motion for a new trial because of the threat of incarcerating Appellant in jail immediately. There was no other reason for such withdrawal of said motion. Petitioner contends that the entire merit his attorney was making concerning the prejudice of the alternate jurors should have been fully heard, and the Court was neither legally nor morally correct in coercing the situation. This can be particularly noted on Page 11, lines 23-25; Page 12, lines 1-14; Page 12, lines 22-end; Page 13, lines 1-3; and Page 15, lines 2-8.

2. Petitioner further contends that S. A. WILLIAMS, who testified on behalf of the Government, was, in effect, a criminal, a liar, and unworthy of belief and should not even have been allowed to take the stand in the herein case. For purposes of corroborating this, Petitioner attaches a copy of a newspaper report marked Exhibit "B".

CONCLUSION

For the reasons set forth above and in petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the 9th Circuit.

Respectfully submitted,

John William Whaley
In Propria Persona

I hereby certify that the foregoing petition for rehearing is precented in good faith and not for delay, and is restricted to grounds specified in Rule 58 in the rules of this Court.

John William Whaley,
Petitioner
In Propria Persona

SAN DIEGO, CALIFORNIA, FRIDAY, OCTOBER 5, 1962, 11:00 A. M.

- - -

(Other court matters.)

THE CLERK: No. 2 on the calendar, Case No. 30993, United States of America v. John William Whaley.

THE COURT: John William Whaley, is that your full, true name?

DEFENDANT WHALEY: Yes, sir.

THE COURT: Mr. Rock Zaitzow who stands at the Bar with you is your attorney?

DEFENDANT WHALEY: Yes, sir.

THE COURT: Do you wish to argue the motion for new trial, Mr. Zaitzow?

MR. ZAITZOW: If the court will allow me to.

THE COURT: Yes. Certainly.

MR. ZAITZOW: First of all, let me inform the court that I come in here, I think, the day before D-Day arrived, the five-day period, and consequently in quite a hurry, and I understand from Mr. Enstrom, and I wish to apologize - apparently my secretary did not send him a copy of the written motion. I wish to put the court on notice of that at this time.

(Other court matters.)

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THE COURT: John William Whaley, is that your full, true name?

DEFENDANT WHALEY: Yes, sir.

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DEFENDANT WHALEY: Yes, sir.

THE COURT: Do you wish to argue the motion for new trial, Mr. Zaitzow?

MR. ZAITZOW: If the court will allow me to.

THE COURT: Yes. Certainly.

MR. ZAITZOW: First of all, let me inform the court that I come in here, I think, the day before D-Day arrived, the five-day period, and consequently in quite a hurry, and I understand from Mr. Enstrom, and I wish to apologize -- apparently my secretary did not send him a copy of the written motion. I wish to put the court on notice of that at this time.

THE COURT: Very well. Well, the Government is always ready

MR. ENSTROM: I had an opportunity yesterday

afternoon to look at the motion, your Honor, in the clerk's office.

THE COURT: Very well.

MR. ZAITZOW: The mostimportant things I wish to argue are two matters, if the court please, and I will not take too much time on this.

No. 1 is concerning the jurors involved in the matter.

I have a witness here who had told me after I returned from Santa Maria as to what has been put in that motion. If the court desires to have him put under oath and tell his story to the court, he is here now and ready and accessible to be heard.

As to the other statement concerning the juror, whose name I presently forget, but he was the second alternate juror, the witness who would testify to that statement would be the defense attorney in this matter, namely, Rock Zaitzow. And if the court desires to have him depos d and put under oath, he would be happy to make himself accessible at that time.

There is no use arguing or going further into those matters, as I think they are clearly put into the situation.

THE COURT: Very well.

MR. ZAITZOW: The most important things I wish to argue are two matters, if the court please, and I will not take too much time on this.

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There is no use arguing or going further into those matters, as I think they are clearly put into the situation.

THE COURT: Well, now, you say that the alternate jurors --

MR. ZAITZOW: If the court please, I cannot hear the court -- especially when the court has his mouth covered up. I am terribly sorry. Thank you.

I cannot hear you, your Honor.

THE COURT: I don't cover my mouth. Why do you make such a remark as that?

MR. ZAITZOW: I didn't mean to be rude. I thought the court was talking, and I couldn't hear what you were saying, sir.

THE COURT: If you can't hear me, say so.

Do you hear me now?

MR. ZAITZOW: Yes, I hear you now.

THE COURT: Very good. I am sorry you weren't able to hear me.

I say the first proposition you make is that the alternate jurors were overheard during the trial discussing car repossession, and the alternate juror finally chosen and entered the jury room was heard to say, to the effect, that he did not approve of auto repossessors and would not believe them.

Now, how do you expect to prove that?

MR. ZAITZOW: The only thing I intend to do is

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I cannot hear you, your Honor.

THE COURT: I don't cover my mouth. Why do you make such a remark as that?

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Do you hear me now?

MR. ZAITZOW: Yes, I hear you now.

THE COURT: Very good. I am sorry you weren't able to hear me.

I say the first proposition you make is that the alternate jurors were overheard during the trial discussing car repossession, and the alternate juror finally chosen and entered the jury room was heard to say, to the effect, that he did not approve of auto repossessors and would not believe them.

Now, how do you expect to prove that?

MR. ZAITZOW: The only thing I intend to do is to tell the court what this person told me, and put him under oath and let him tell the judge this.

THE COURT: Then you say that "The alternate juror

was overheard to say that he sat in Superior Court and was always removed as a prospective juror in that he was a close associate of one Don Killer, District Attorney of the County of San Diego."

MR. ZAITZOW: Yes, sir.

THE COURT: Well, how do you expect to prove that?

MR. ZAITZOW: Again, by testimony of a particular individual who heard that.

THE COURT: You don't say which alternate juror.

MR. ZAITZOW: I do not remember their names. The second alternate juror who was not in the jury room.

THE COURT: In other words, B applies to the alternate juror who did not serve at all?

MR. ZAITZOW: Yes, sir. That is why it was never presented. This was overheard. The court had instructed and admonished the jury on several occasions, and rightfully so, that they should not discuss the case with anyone. Also, the court had asked respective questions of the jurors in the initial stages concerning any acquaintance -- I forget how the court stated it -- concerning acquaintanceship with any law enforcement agency, federal, state, [illegible]

was a close associate of one Don Killer, District Attorney of the County of San Diego."

MR. ZAITZOW: Yes, sir.

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THE COURT: Well, of course, that might be a contempt of court. But the alternate juror never participated in the verdict.

MR. ZAITZOW: That is true. And that is why when the witness who overheard the alternate juror make these statements, which witness was myself, I felt that at the time that he could not hurt the case because he was out in the hallway rather than in the jury room with his fellow jurors.

THE COURT: You mean you heard him say this?

MR. ZAITZOW: I sure did.

THE COURT: Why didn't you tell me at the time?

MR. ZAITZOW: Well, at that time, your Honor, itwas at the time when the juror took ill, the other juror went in, and we were walking back and forth across the hall, and it was the feeling of defense counsel that even while he was making this remark to apparently one of the husbands of one of the jurors, that it would be unprejudicial to the defense, as he was out in the hallway and not in the jury room.

THE COURT: So that leaves only A. B could not serve as a ground then, subdivision B, ground 2 of

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THE COURT: You mean you heard him say this?

MR. ZAITZOW: I sure did.

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THE COURT: So that leaves only A. B could not serve as a ground then, subdivision B, ground 2 of your motion.

Let's take a look at A. Who is this that overheard that statement?

MR. ZAITZOW: This gentlemen here, sir, (indicating).

THE COURT: Do you know him?

MR. ZAITZOW: Do I know him personally?

THE COURT: Yes. I mean, who is he?

MR. ZAITZOW: He was a witness in our case, and a witness who was here.

THE COURT: A witness for whom?

MR. ZAITZOW: A witness for the defendant.

THE COURT: Was he here during the deliberations of the jury?

MR. ZAITZOW: No, sir. He returned at one particular time. He returned, from what I understand, around dinnertime. I am not sure of the juror's name. It was either Arrebui or Arregui.

THE COURT: Well, the alternate whom you chose and the defendant chose.

MR. ZAITZOW: That is true.

THE COURT: This man never told you about it during the trial?

MR. ZAITZOW: Sir, from the information he gave me he had heard the statements made, and I had gone, and

THE COURT: Do you know him?

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THE COURT: Well, the alternate whom you chose and the defendant chose.

MR. ZAITZOW: That is true.

THE COURT: This man never told you about it during the trial?

MR. ZAITZOW: Sir, from the information he gave me he had heard the statements made, and I had gone, and he didn't get in touch with me -- the next day he could not get in touch with me because, obviously, I was out of town and did not return until I came to their office next

week to speak with the defendant's wife. And he came and we started talking. And he told me what, in the course of many statements, he had overheard. And I asked him why he didn't tell me this, and he said he didn't think it was that important. And I told him I thought differently and it should be presented to the court, and brought to the court's attention.

THE COURT: How does the Government view this matter?

MR. ENSTROM: May I inquire of the clerk's file for a moment to look at this ground? Or if there is an extra copy available --

THE COURT: You see, that's the difficulty of these matters that come up after a verdict. The jurors themselves are not permitted to stultify their verdict.

MR. ENSTROM: The matter is certainly very vaguely put and isn't placed before your Honor in the form which I think is supported by affidavit that the rule requires. In this form I don't think that it is a ground for the granting of the motion that is requested.

THE COURT: Whom did the alternate say this to?

MR. ZAITZOW: Whom did the alternate say this to?

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THE COURT: Whom did the alternate say this to?

MR. ZAITZOW: Whom did the alternate say this to?

THE COURT: Yes.

MR. ZAITZOW: Would the court allow me ten seconds to talk to the witness?

THE COURT: Yes.

MR. ZAITZOW: It is the claim of the witness that this conversation took place between Alternate Juror No. 1 and Alternate Juror No. 2, whom he describes as a man, tall, dressed in a blue suit.

THE COURT: Well, if we retry the matter, it's a question of whether there was any misconduct on the part of the juror -- rather, not whether there was misconduct but whether he was qualified.

MR. ZAITZOW: If the court please --

THE COURT: It really goes to his qualifications rather than -- well, I will put it over, if you wish me to, until the 30th of October, and I will hear the evidence on it. But I wouldn't attempt to decide it without having all parties and witnesses here and let them give their version of it.

What is your witness' name?

Mr. Clerk, who were the alternate jurors? I don't have my notes here.

MR. ZAITZOW: His name is Eugene Swartwood.

THE COURT: He testified at the trial.

MR. ZAITZOW: Yes, sir.

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What is your witness' name?

Mr. Clerk, who were the alternate jurors? I don't have my notes here.

MR. ZAITZOW: His name is Eugene Swartwood.

THE COURT: He testified at the trial.

MR. ZAITZOW: Yes, sir.

THE CLERK: The first alternate juror was Alfonso Arregui and the second alternate juror was Albert Ambler.

THE COURT: Does Mr. Swartwood say that there is anyone else who could possibly have overheard this conversation?

MR. ZAITZOW: With the court's permission, one more minute.

(Discussion outside the hearing of the reporter.)

MR. ZAITZOW: Your Honor, I was just talking to Mr. Swartwood and he informs me that he was walking out with a person by the name of Charlie, who was ahead of him, and he was lagging behind when this happened. And he doesn't know if Charlie heard this or not.

THE COURT: Who is Charlie? Charlie who?

MR. ZAITZOW: A man by the name of Charlie Rhoades. Defense counsel does not know who he is. However, the court places me again in this position, if the court please: My client is in custody. I felt -- I did not bring these facts to the court's attention for the purpose of in any way trying to -- I am at a loss of words trying to accost the court in this manner. I took it on my own after hearing the story to present it to the court. I felt it was my duty as an attorney, not only as a defense attorney on behalf of my client, but as an attorney generally.

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However, I understand the predicament I have placed the court in. And yet, with this -- I was cognizant of what the court may have to do, such as delay, but I am

also beset with this, if the court please, that my client is in jail --

THE COURT: He is going to stay there until sentence, too.

MR. ZAITZOW: I know. I would --

THE COURT: I interrupt you just so you will save yourself some time.

MR. ZAITZOW: Yes. I was made cognizant of the court's policy after the trial.

Would the court allow me a couple of minutes to speak with my client?

THE COURT: Yes.

MR. ZAITZOW: I would appreciate it if the court would.

THE COURT: Very well.

(Discussion between counsel and defendant.)

MR. ZAITZOW: Thankyou.

My client informs me that he feels that he wants to get the sentencing today because he feels that this thing has been hanging over his head for many a month. And this is his position.

THE COURT: Well, I won't go ahead with it

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(Discussion between counsel and defendant.)

MR. ZAITZOW: Thankyou.

My client informs me that he feels that he wants to get the sentencing today because he feels that this thing has been hanging over his head for many a month. And this is his position.

THE COURT: Well, I won't go ahead with it unless you want to withdraw your motion for a new trial upon those grounds. I expect to go to the bottom of it. It not only involves this defendant, but it involves the

integrity of the jury process. And if I find that those people falsely answered questions at the time they were impaneled, why, they are in serious trouble, too.

MR. ZAITZOW: I am fully aware of that, and that is why I felt it should be presented to the court.

THE COURT: Of course, those things should be presented before anything can turn on it.

MR. ZAITZOW: Right.

THE COURT: They should be presented before the verdict. They should be presented immediately. The fact that they are presented after an adverse verdict, particularly by a person who is interested, colors the whole matter.

MR. ZAITZOW: I understand that, your Honor.

THE COURT: And you have nothing but the testimony of interested people.

MR. ZAITZOW: Right.

THE COURT: The alternate jurors who are alleged to have said these things, of course, they are interested. The person who reported it after an adverse verdict is interested.

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MR. ZAITZOW: Right.

THE COURT: The alternate jurors who are alleged to have said these things, of course, they are interested. The person who reported it after an adverse verdict is interested.

MR. ZAITZOW: That is very true.

THE COURT: Whereas, if he had reported it prior to the verdict, he would be in the position of a relatively disinterested person. No one knows how those matters are

going.

MR. ZAITZOW: I cannot help but agree with the court. But I hope the court understands my position in bringing this forward to the court.

THE COURT: I think you should have said something about that other juror the other night.

MR. ZAITZOW: For the record, I was debating that with my client when we were walking down the hallway together, and it was my own determination -- and I take this fully on my own shoulders -- that when we arrived at the conclusion, you remember in the trial when the court was kind enough to allow defense counsel to choose between Alternate Juror No. 1 and Alternate Juror No. 2, and defense counsel made the decision to choose Alternate Juror No. 1, and then when this was heard thereafter I remember deliberating about presenting this to the attention of the court, and to advising my client that, "Thank goodness, we didn't choose Alternate No. 2," after hearing his remarks. If one more juror had been taken ill, I could assure the court very readily that this would have been brought to his attention at that time.

But notwithstanding those factors, I do not want

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But notwithstanding those factors, I do not want to place my client in the position of waiting another three weeks for this, so I will withdraw that situation on the basis for a new trial.

Will the court allow me to go on on more point?

THE COURT: You wish to withdraw now any motion for a new trial based upon any claimed misconduct or disqualification of any juror or alternate, is that correct?

MR. ZAITZOW: Yes, sir.

THE COURT: Is that your desire? Do you understand that, Mr. Whaley?

DEFENDANT WHALEY: Yes, sir.

THE COURT: I expect to have the matter investigated in any event.

Mr. United States Attorney, I expect this matter to be fully investigated and, if the investigation warrants, in your judgment, I want a hearing on the 30th of October.

MR. ENSTROM: Yes, your Honor.

THE COURT: I want to hear all the witnesses.

MR. ZAITZOW: Let me state on that proposition that upon giving just half reasonable notice, defense counsel will make himself readily available.

THE COURT: October 30th. We will set it for 1:30 in the afternoon, October 30th.

Now, you let Mr. Zaitzow know if your office concludes it warrants any further investigation and

for a new trial based upon any claimed misconduct or disqualification of any juror or alternate, is that correct?

MR. ZAITZOW: Yes, sir.

THE COURT: Is that your desire? Do you understand that, Mr. Whaley?

DEFENDANT WHALEY: Yes, sir.

THE COURT: I expect to have the matter investigated in any event.

Mr. United States Attorney, I expect this matter to be fully investigated and, if the investigation warrants, in your judgment, I want a hearing on the 30th of October.

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Now, you let Mr. Zaitzow know if your office concludes it warrants any further investigation and further hearing.

MR. ENSTROM: Yes, your Honor.

THE COURT: Interview everyone, and have everyone

3 Found Guilty Of Counterfeit Bill Charges

By TIM SHEPARD

A federal court jury yesterday found two brothers and a toy designer guilty of counterfeiting $128,000 in $20 bills.

Each defendant faces a possible sentence of 65 years when he appears for sentencing before U.S. District Court Judge James M. Carter March 30.

The jury convicted one of the brothers — Shafaeh (Doc) Ashook Williams, 50, of 515 Dewey St. — although the other two defendants tried to take the blame.

Codefendants are Edward Williams Ashook, 47, of 2971 Calle Cumble, and Richard Hashagen, 39, a toy designer of 5727 Rancho Hills Dr. Williams and Ashook are brothers.

4-DAY TRIAL

The jury of six men and six women deliberated for 1½ hours after the four-day trial before finding the defendants guilty of four counts of counterfeiting and one count of conspiracy. The counterfeiting charges are punishable by sentencing up to 15 years each. Conspiracy calls for a 5-year sentence.

Assistant U.S. Atty. Elmer Enstrom called a 13-year-old National City boy as a surprise rebuttal witness to refute defense allegations that all except six bogus $20 bills had been burned by one of the defendants.

Gregory Newell, 13, of 1905 E. Seventh St., National City, told the jury that he found 24 counterfeit $20 bills Feb. 23 while taking a shortcut to his home. The bogus bills were turned over to National City police after the boy found them in a drainage ditch near 10th Avenue and Palm Avenue in National City.

Ashook had testified that he had burned all of the bogus bills last November.

The bogus bills were printed on a rented offset printing press in a rented office on National Avenue, according to Enstrom.

Ashook also testified that he and Hashagen had printed the bogus bills as a lark and slipped them to his brother, Doc Williams, as a joke. They claimed he did not know they were counterfeits.

Enstrom, however, established that six of the bills were passed and that two of them reached the Federal Reserve Bank in Los Angeles before they were detected.

CALLED LEADER

Enstrom pictured Williams as the ring leader. He told the jury it would have to believe that Charles Peyton, Secret Service agent in charge of the local office, was a liar in order to accept the stories of the defendants. The defendants tried to refute confessions they made at the time of their arrest here last November.

Williams and Ashook are brothers, according to Enstrom, although they go by different last names.

Williams was free on $25,000 bail pending appeal on a Los Angeles grand theft conviction at the time of his arrest on the counterfeit charges.